NTSB Order No.
EM-19

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 2nd day of December 1971.

CHESTER R. BENDER, Commandant, United States Coast Guard

vs.

ROBERT WILLIAM BOZEMAN

DOCKET ME-20

OPINION AND ORDER

The appellant, Robert W. Bozeman, has appealed from the decision of the Commandant affirming the revocation of his merchant mariner's document (No. Z-777229) and all other seaman's documents for misconduct while serving, under authority of these documents, as a deck maintenance man aboard the SS HOOSIER STATE, a merchant vessel of the United States.[1]

The previous appeal to the Commandant was taken by appellant (Appeal No. 1826) from the initial decision of Coast Guard Examiner Allen L. Smith. [2] A hearing on the misconduct charge was held before the examiner at Tampa, florida, on June 19, 1969. Appellant appeared pro se and pleaded guilty upon the examiner's reading of the charge and the specification of facts therein, alleging that on May 28, 1966, while the vessel was at sea, he did "wrongfully assault and batter a fellow crewmember, Carl Poyas, Z-744050, with a weapon, to wit: a knife."

The examiner inquired whether appellant understood the consequences of his plea and yet wished to maintain it. appellant requested a second reading and, when the examiner repeated the

[1]The action of the Commandant was taken pursuant to 46 U.S.C. 239(g) and is appealable to this Board under 49 U.S.C. 1654(b)(2). The Board's rules of procedure governing such appeals are set forth in 14 CFR Part 425.

[2]Copies of the decisions of the examiner and the Commandant are attached hereto.

allegations charged, again stated that he was guilty and wished to maintain his plea (Tr. 8). Appellant reserved his right to present an opening statement in the way of argument or mitigation until the close of the Coast Guard's case.

The Coast Guard offered in evidence depositions taken in San Francisco during September 12 to 22, 1966, pursuant to the examiner's order, from the master of the HOOSIER STATE, as well as the first and third mates and four of the crewmembers. Without objection, the examiner received the depositions in evidence (Tr. 21). [3]

From the four crewmembers' depositions, it appears that a fight between appellant and Poyas erupted suddenly in the crew messhall as Poyas, a messman, was serving appellant's breakfast. These four deponents, who assisted in stopping the fight, testified that after appellant and Poyas were separated, Poyas was wounded and bleeding while appellant was unmarked. There of these crewmen also testified that appellant was holding a knife in his hand, while the fourth testified that his view was blocked since he " was still holding Carl [Poyas] back from any revenge." There was further testimony that a previous minor altercation had occurred between appellant and Poyas during the voyage.

The depositions of the ship's officers recount events shortly after the fight. They provide a clear description of the injuries to Poyas, consisting of five superficial wounds and two deep wounds on his left arm, which injuries required his removal from the vessel at Kaohsiung, Taiwan, for a 10-day period of hospitalization. They also concern appellant's voluntary admissions to the officers [4] that he had stabbed Poyas, for the reason that Poyas was always touching him at mealtime, and that he couldn't stand for it when, on the morning in question, Poyas had done it again. He voluntarily surrendered his pocketknife to the

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[3]The examiner first ascertained that appellant had reviewed the depositions prior to the hearing (Tr. 18). Appellant's preliminary objection was to certain testimony by the chief mate that he tended to be apathetic and to desire solitude during the voyage. This was resolved by the examiner's ruling that he would give no weight to such testimony.

[4] Appellant's admissions were made immediately to the master and the chief mate and on the following day to the third mate.

master.

Appellant's signed statement taken aboard ship, annexed to the chief mate's deposition, deals only with the events leading up to the fight. Here, he states that upon entering the messhall for breakfast, Poyas told another messman, "don't worry I will get him," and stared at him as he walked by. After Poyas brought his order, according to appellant he "went back and got the toast. as he put it down he put his hand on me. this happening often and this morning I just couldn't take it ***."

Appellant's statement at the hearing, which conforms to his previous statements aboard ship that Poyas was continually touching him at mealtime, concludes that as Poyas said he would "get him ***he's at my back, and I had kept my hand in my pocket when he came at me a lot of time. I have a right to protect myself."

The Commandant, on review, found that the factual allegations supporting the charge were established and in addition that, "At the time of the encounter, Poyas was not armed. As a result of the stabbing Poyas was hospitalized for more than ten days."[5] Both the examiner and the Commandant predicated their revocation order upon the offense found proved, lack of provocation, and the seriousness of the injuries inflicted on Poyas.

Acting through legal counsel on appeal, appellant's brief to this Board disputes all findings made on grounds that:

(1) The plea was improvidently entered without benefit of counsel;

(2) His statement at the hearing raised the issue of self-defense and was inconsistent with his plea; and

(3) The depositions indicate Poyas' injuries were superficial, and resulted either from mutual combat or due to prior provocation of Poyas.

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[5] The examiner's findings were essentially similar but expressed at greater length and in evidentiary terms. In his conclusions, the examiner found that the charge and specification were proved by the plea. Under 46 U.S.C. 239(g), the Commandant may alter or modify any finding. Accordingly, the Commandant's findings are those under review upon this appeal. 49 U.S.C. 1654(b)(2).

He further contends that the depositions are inadmissible, having been taken in violation of his rights to confrontation and cross-examination, and prejudicial because of one instance of hearsay therein relating to his medical history; and, finally, that the sanction is an abuse of discretion since this was his first serious seaman's offense. Counsel for the Commandant has not filed a reply brief.

Upon consideration of appellant's brief and the entire record, the Board concludes that the revocation action in this case, based on the findings of the examiner as affirmed by the Commandant, is supported by substantial, reliable, and probative evidence. We adopt these findings as our own to the extent not modified herein. Moreover, we conclude that the sanction is warranted for the offense involved.

We do not agree with the Commandant's subsidiary rationale that the sanction is supportable on the basis of appellant's plea, because "assault and battery with a dangerous weapon cannot be committed without a necessary inference of injury." A battery may encompass any unauthorized touching of another. It follows that, although perpetrated with a knife, a battery does not invariable result in injury. [6] However, the testimony by deposition, reflected above, clearly substantiates the element of injury to Poyas from serious knife wounds. This proof without more, coupled with his unequivocal plea which in our view obviated the necessity of proof of the elements of assault and battery with a knife upon Poyas, would support the sanction prima facie.

Appellant now contends that his hearing statement raised defenses and factors in mitigation. These are also affirmatively disproved by the depositions. Any notion that he had sufficient provocation or was acting in self-defense is dispelled by his prior admissions aboard ship and the testimony of eyewitnesses. There is no evidence whatsoever that Poyas was armed. The fact that appellant was armed with a pocketknife was established by the evidence and is not contested. In a feeble attempt to show that he might reasonably think that Poyas was armed, appellant points to

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[6]See e.g., Commandant v. Velazquez, Order EM-17, adopted September 1,1971, at pp.4-5. The Commandant's decision herein concedes that, under his regulations, revocation is not provided for assault with a dangerous weapon (no injury). 46 CFR 137.20-165, Group F. Nevertheless, we hold that appellant was sufficiently apprised that his injury of Poyas was in issue and being litigated. See Commandant v. Reagan, Order EM-9, adopted March 12, 1970, at page 7.

one witness' testimony that he thought Poyas was carrying a knife during the previous minor altercation with appellant. This argument is wholly deflated, since in explaining his supposition the witness added that he "could see there was a bulge, [but] couldn't see a knife*** [and] couldn't tell if it was a tin can or anything ***."

In sum, all the evidence or record indicates that appellant's provocation stemmed from anger at Poyas for continually touching him. We are convinced that he did not act out of fear that Poyas would attack him, with or without a knife. Poyas' statement in the messhall that he would "get" appellant, taken in context, obviously meant that he was going to serve his breakfast. Whether Poyas' touching of appellant was purposeful or not, and we are inclined to believe it was, it would not be considered sufficient provocation under the law for knifing him. Moreover, assuming arguendo that Poyas might have consented to engage him in mutual combat, appellant's excessive retaliation is established by the knifing and warrants the sanction imposed.[7]

Questions remain as to the admissibility of the depositions and appellant's claim of improvidence in pleading guilty. To analyze these question, we must advert to documents in the record reflecting the prolonged and involved history of this case.

It is undisputed that the misconduct charge against appellant was instituted in San Francisco for a hearing on June 24, 1966. [8] On appellant's motion, made through his then counsel on June 6, 1966, venue was changed to the 7th Coast Guard District in Florida, on grounds that his home was near Tampa and it would be an undue financial hardship to require him to remain in San Francisco awaiting the hearing.[9] The examiner in San Francisco warned appellant's counsel that since witnesses from the vessel were expected to be available there in time for the hearing, transferring the case would force the examiner in Florida to take their testimony by deposition. Counsel responded that appellant recognized the disadvantages of this procedure, adding: "If he has

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[7] Commandant v. garcia, Order EM-15, adopted April 14, 1971.

[8] It appears that appellant was served with the charge in San Francisco on June 3, 1966.

[9] Appellant was also required to submit to a psychiatric examination, as authorized by Coast Guard regulations under 46 CFR 137.20-21. Due to the absence of any public health facilities in Tampa, appellant was examined and determined to be "fit for duty" by the Public Health Hospital in New Orleans.

to do it by written interrogatories, he has to, but this is his desire and as his counsel I think he is entitled to it ***. He can hire counsel in Florida that would represent him adequately, I'm sure." (Exhibit A, Tr. 7-8.) Thus, it was indicated that appellant's counsel was then withdrawing from the case and that appellant was offering no objection at that time to the taking of witnesses' testimony by deposition or upon written interrogatories.

On July 18, 1966, the record further shows that appellant signed a statement addressed to the Coast Guard office in Tampa, that on such date he was advised that the case would "now proceed*** [with] depositions or testimony*** from witnesses as they became available, "agreeing to keep them informed of his whereabouts for the purpose of receiving notice, and that, if he failed to do so, "matters in this hearing can proceed in my absence" (Tr. p. 12).

Shortly thereafter, appellant shipped out on a foreign voyage and was unavailable for service of the Coast Guard's application, and the examiner's order, for the taking of depositions on July 22 and 23, respectively. He stayed in foreign waters almost continuously, working aboard ships operating among ports in the Far East, until January 15, 1969 (Tr. 22-23). He next appeared at the Coast Guard office in Tampa on June 19, 1969, after an absence of almost 3 years.

Thus it is not only clear that appellant had proper notice of the taking of depositions, it is equally clear that the examiner was entitled to proceed with the case in absentia. [10] Under the circumstances recited above, we have no hesitancy in holding that appellant consciously and purposefully waived all of his rights in connection with the taking of this evidence. Accordingly, in our view, the depositions were admissible at appellant's hearing. We have no occasion to consider whether one reference therein by the master to appellant's prior medical history is prejudicial matter, since the examiner accorded no weight such evidence.

Appellant bases his claimed improvidence on inadequate comprehension of his right to counsel prior to entering his plea of guilty. Putting aside his representation by counsel at the initial hearing at San Francisco, the record of his hearing at Tampa discloses that he was fully advised by the examiner, prior to entering his plea, of the nature of the proceeding and his right to counsel, as well as his additional rights to call or subpoena witnesses, take testimony by deposition if necessary, introduce relevant evidence, cross-examine witnesses against him, and testify

[10] 46 CFR 137.20-25.

in his own behalf or remain silent without inference of guilt. All of these explanations were delivered to appellant in the standard manner according to Coast Guard regulations, [11] assuring him of his rights to counsel and a full evidentiary hearing if he so desired. Appellant indicated throughout these preliminary explanations, comprising some seven pages in the transcript, that he understood them in full. The only inference we may draw is that appellant knowingly exercised his freedom of choice in these matters. No adequate showing is made that he possessed insufficient intelligence to comprehend the consequences of his decisions.

Appellant's argument that counsel should have been appointed to represent him at the hearing is without merit. the precedent he cites [12] applies to his presentation of an indigent parolee at a revocation hearing before a Federal parole board. Our case is clearly distinguishable since appellant's liberty is not here involved, and no criminal sanction may be imposed. Rather, this revocation action is a civil sanction canceling appellant's authorization to pursue the calling of a seaman. As such, no requirement existed for the appointment of counsel. [13] Moreover, appellant makes no showing of indigence.

Finally, we are far from regarding appellant's sanction as an abuse of discretion. Despite the absence of any serious offense in his prior seaman's record, [14] we agree with the examiner that by his serious misconduct herein he has displayed an "irresponsible and unstable" disposition toward violence. The examiner further determined that such an individual would pose a continuing threat to the safety and well-being of other seamen aboard ship. Again we agree that the extreme degree of appellant's violence, unleashed by nothing more than his resentment at the annoying but harmless touches of Poyas, and the latter's serious injuries, support such determination and the sanction of revocation in this case.

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[11]46 CFR 137.20-35, 137.20-45, 137.20-140.

[12]Earnest v. Willingham (10th Cir. 1969) 406 F. 2d. 681.

[13]Boruski v. SEC (2d Cir. 1965) 340 F. 2d. 991; 1 Davis Administrative Law, section 2.13.

[14]Appellant's prior seaman's record was brought out at the hearing in accordance with 46 CFR 137.20-160(a). (Tr. 26.) This shows only that two admonitions were issued to him in 1959 and 1961 for failures to join his vessels at U.S. ports. these would be classed as minor offenses under Coast Guard regulations 46 CFR 137.20-165, Group A.

ACCORDINGLY, IT IS ORDERED THAT:

1.The instant appeal be and it hereby is denied; and

2.The order of the Commandant affirming the examiner's revocation of appellant's seaman's documents under authority of 46 U.S.C. 239(g) be and it hereby is affirmed.

LAUREL, McADAMS, and THAYER, Members, concurred in the above opinion and order. REED, Chairman, and BURGESS, Member, were absent, not voting.

(SEAL)